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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROGER GUTIERREZ, et al., Defendant and Appellant.	B265994 (Los Angeles County Super. Ct. No. BA409950)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Affirmed in part, reversed in part, and remanded.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Roger Gutierrez.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant Ernest Michael Ortiz.

Robert H. Derham, under appointment by the Court of Appeal, for Defendant and Appellant Rudy Leonardo Escarcega.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Connie H. Kan, Deputy Attorney General, for Plaintiff and Respondent.

The jury convicted defendants and appellants Roger Gutierrez, Ernest Michael Ortiz, and Rudy Leonardo Escarcega of murder. (Pen. Code, §187.)[1] It found true the allegations that a principal personally and intentionally discharged a firearm which proximately caused great bodily injury and death (§ 12022.53, subds. (d), (e)(1)); a principal personally and intentionally discharged a firearm (§ 12022.53, subds. (c), (e)(1)); and a principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)). The jury also found true the allegation that the murder was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(5)).[2]

Defendants were each sentenced to 50 years-to-life in prison, comprised of 25 years-to-life for the murder convictions, plus a term of 25 years-to-life for the section 12022.53, subdivisions (d) and (e)(1), enhancements. With respect to the section 186.22, subdivision (b)(5), gang enhancements, the trial court imposed and stayed 10-year sentences as to each defendant pursuant to section 654, and also imposed and stayed the remaining firearms enhancements.

Gutierrez contends: (1) admission of Escarcega's statements to a confidential informant violated his Sixth Amendment right to confrontation and state evidentiary laws; (2) the trial court erred in failing to require the prosecution to establish it exercised reasonable diligence to produce the confidential informant; (3) the trial court's refusal to excise statements made by the confidential informant impugning his character violated his due process rights; and (4) the trial court erred in declining to consider youth-related factors under *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] (*Miller*) when sentencing him, in violation of his rights under the Eighth Amendment. In the event that his conviction is affirmed, Gutierrez requests that we either remand to the trial court for

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[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] It was also alleged that Gutierrez suffered a prior conviction for a serious and/or violent felony under the three strikes law. The trial court determined Gutierrez's sustained juvenile petition did not qualify as a strike prior conviction.

consideration of the *Miller* factors, or modify his sentence to include a specific provision for a parole hearing in his 25th year of incarceration. Gutierrez also joins in the arguments of his co-defendants, pursuant to California Rules of Court, rule 8.200 (a)(5).

Ortiz separately contends: (1) insufficient evidence supports his first degree murder conviction; (2) the jury was incorrectly instructed on conspiracy liability; (3) admission of Escarcega's statements to a confidential informant violated his constitutional right to confrontation and state evidentiary laws; (4) the trial court erred in failing to require the prosecution to establish it exercised reasonable diligence to produce the confidential informant; (5) the trial court erred in imposing and staying a 10-year gang enhancement; and (6) his presentence custody credits were miscalculated.[3] Ortiz also joins in the arguments of his codefendants to the extent that they benefit him.

Escarcega separately contends: (1) the trial court erred in failing to require the prosecution to establish it exercised reasonable diligence to produce the confidential informant; and (2) the trial court erred in imposing and staying a 10-year gang enhancement. He joins in any additional arguments made by Ortiz and Gutierrez with respect to the trial court's failure to require the prosecution to show it exercised reasonable diligence to produce the confidential informant.

The Attorney General concedes that the 10-year gang enhancements were imposed in error, and that Ortiz's presentence custody credits were calculated incorrectly, but disagrees with Ortiz as to the number of credits earned. The Attorney General opposes the remaining contentions.

Although we hold that Gutierrez's contention that his sentence violates the Eighth Amendment is moot, we agree that the matter must be remanded to the trial court for the limited purpose of allowing Gutierrez an adequate opportunity to make a record of information that will be relevant to his future youth offender parole hearing. We also agree with the parties that the 10-year gang enhancement sentences must be stricken as to all three defendants, and with the Attorney General that Ortiz's presentence custody

[3] Ortiz requested correction of his custody credits by letter to the Superior Court, dated December 15, 2015, and received by this court on December 30, 2015.

credits must be corrected to reflect that he is entitled to 773 days of credit. In all other respects, the judgments are affirmed.

FACTS

Prosecution

The Murder

On the evening of March 11, 2010, Hector Gomez was sitting on a bench with six or seven other people at Reggie Rodriguez Park in Montebello, waiting to play basketball. David Jimenez was playing on the court with approximately 10 to 20 other people. Defendants walked past Gomez, saying "VNE,"[4] and claiming the area as their "barrio." Jimenez recognized Escarcega, because he had seen Escarcega with his brother, Jimmy ("Joker"), who was also a VNE gang member. Jimenez did not know Escarcega's name or gang moniker. Jimenez did not recognize the other two men. He did notice that one man was taller than the other two—estimating the man's height at five feet eleven inches, or six feet. He thought all three men were approximately 19 to 20 years old. Gomez did not see defendants' faces, but he too saw that that one of the men was taller than the others—between five feet nine inches, and six feet tall. The other two men were considerably shorter—possibly five feet six inches or five feet seven inches tall.[5] Gomez thought the men appeared to be in their late teens or early twenties.

Jimenez and Gomez saw all three men walk toward Mines Street, and then return after a few minutes. They walked up to Raymond Camberos, who was playing basketball, and asked him where he was from, which Jimenez understood to mean, "What

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[4] VNE is an acronym for the Varrio Nuevo Estrada gang.

[5] Ortiz was six feet tall and weighed approximately 190 pounds. Gutierrez was five feet seven inches tall and weighed approximately 160 pounds. Escarcega was five feet nine inches tall.

gang are you from?" Camberos told them he was from the King Kobras. Jimenez thought the gang was a rival of VNE. Jimenez had not previously known Camberos was in a gang, but Camberos had tattoos on his forearms. Escarcega and the other short man began fighting with Camberos right after he identified himself as a King Kobra. Jimenez believed he saw Escarcega throw the first punch. The tall man stood nearby, telling everyone who came close to "back off."

Camberos ran, with defendants giving chase. The taller man was a little bit behind Escarcega and the other short man. Gomez heard two gunshots coming from Mines Street after the men were out of view. Jimenez heard two or three gunshots. They went to the area where they heard the gunfire, and found Camberos lying in a driveway, breathing, but unable to speak. Gomez left, but he reported what he had seen to police the next day. Jimenez also left.

Rafael Rivera was at home at the time of the murder, when he heard three gunshots. When he went outside to investigate, he saw three men jumping over a fence into the Rio Hondo riverbed. They were wearing "baggy pants" and dark-colored clothing. One of the men was not wearing a shirt. Rivera walked down Mines Street to where Camberos was lying on the ground, mumbling. Rivera's wife called 911.

The Investigation

Montebello Police Department Officer Sergio Andrade responded to the scene. Camberos was lying on the ground, not breathing. Office Andrade heard over his radio that three males were seen running into the Rio Hondo riverbed. Spent shell casings were on the ground near Camberos's body.

Montebello Police Department Detective Paul Antista also responded to the crime scene and collected video footage taken from a surveillance camera at the park. The surveillance video showed a basketball game being played.[6] Three men entered a

[6] The surveillance video was played for the jury.

restroom for a short time, and then returned to the basketball court. The video showed the men walking behind the basketball hoop. A man ran off the basketball court toward the parking lot, with the three men in pursuit. Soon afterward, people began running out of the park.

Detective Antista interviewed Lizette Garcia, a friend of defendants' who saw them often. On the night of the murder, Garcia went to a party in a hotel room. Several VNE gang members were present, including Cassandra Mena ("Nina"), Monique Robinson ("Tummy"), Filipe Simano ("Chunky"), Jesus Ortiz ("C-Boy"), Ortiz ("Thumper"), Gutierrez ("Rival"), and Escarcega ("Smilely"). Gutierrez was lying on the bed intoxicated. Ortiz had a chrome revolver tucked into his waistband, and was running around the room, acting "hysterical" and "paranoid." He looked out of the window repeatedly. When Mena's cell phone rang, he made everyone put their cell phones in a paper bag.

Senior Criminalist Manuel Munoz analyzed the three spent casings found at the scene. He determined that all three of the casings were nine millimeter Luger caliber, manufactured by Winchester. Munoz opined they were fired from the same firearm. He also analyzed a bullet retrieved from Camberos's body, which he opined was a Winchester nine-millimeter Luger caliber.

The autopsy revealed that Camberos was killed by a gunshot wound to the back. The medical examiner also observed a pattern of abrasions on multiple sides of Camberos's body, which indicated he was involved in a "struggle" or "scuffle."

Operation Sudden Impact

Around the time of the murder there were many unsolved homicides in the Montebello area. The Montebello Police Department was "losing control of the streets." A task force called Operation Sudden Impact was created to get information and resolve the cases. The task force included the Bureau of Alcohol, Tobacco, and Firearms, the California Department of Corrections, the Los Angeles County Sheriff's Department, the

Long Beach Police Department, and the Montebello Police Department. As part of the operation, a number of informants were utilized, including an informant who was used to obtain information from Escarcega. The operation also involved listening to phone calls made by gang members in various prison facilities, including calls by all three defendants.

Recorded Jail Calls

While in custody, Escarcega called his girlfriend. He told her that the police had questioned him about "that shit on Reggie Rodriguez." He told her, "I did the crime, so I'll do the time."

Ortiz called his mother while in custody on other charges, and asked her several time to pay his bail. He wanted to be released before it became too expensive. He said, "Just keep it called and keep it updated because I don't know when they're going to try and raise [the amount of bail]. I want to get in now while it's cheap so I can get the fuck out of here."

Gutierrez called his sister from jail and told her he had the "names of . . . [t]hose that are going to testify, the 15 witnesses." She said she needed all of the names. Gutierrez told her to write them down when she visited him. She said she was afraid of being caught, and Gutierrez responded, "If they catch us, you know? Fucking just eat it, swallow it."

Confidential Informant

Escarcega was in custody on unrelated charges but was returned to California in the hope that he would reveal information about the murder of Camberos.[7] On July 29, 2011, Detective Omar Rodriguez of the Montebello Police Department asked Escarcega

[7] In the unrelated charge, Escarcega was charged in California but being held in a facility located in Mississippi.

if he knew anything about the murder in Reggie Rodriguez Park. Escarcega denied any knowledge of the incident.

Detective Rodriguez placed a hidden transmitting device on an informant. The informant was taken to a jail cell, where officers pretended to search him before placing him in a cell with Escarcega. Detective Rodriguez listened to the entire recorded conversation between Escarcega and the informant as it occurred.

Escarcega and the informant had not previously met, but they immediately identified themselves to each other as VNE members. The informant was a former VNE member, but told Escarcega he was currently in the gang, and had "just come out of the woodwork . . . ." He told Escarcega that he had been arrested "[f]or open container, a fucking knife, and I told them they couldn't search my car." The informant knew many of Escarcega's friends and associates in VNE, including Gutierrez. The two spoke at length about other VNE members, and Gutierrez in particular.

Early in the conversation, Escarcega volunteered that Ortiz and Gutierrez were his "crimeys," and asked the informant, "You ever hear about the shit at the park? With that Kit Kat?" "I think that's why [the police] brought me back." In reference to the incident at the park, Escarcega remarked, "It is what it is. I can't take it back." He asked the informant, who he understood would be released soon, to tell Ortiz to "stay low key" and "try not to get busted." "[T]ell Thumper he is the only one that's not busted."

Escarcega said that he, Gutierrez, and Ortiz had been looking for rivals on the day of the murder: "We was trying to run a muck [*sic*], running all over the hood fucking, I remember there was some taggers right there and me and Rival went up to them, I went up to the first fool where you fools from? Pow, pow, pow, got off [Unintelligible]. . . ." "[E]arlier in the day we seen some fools dog. We hit them fools from, like, where you from? They were like, were [*sic*] not from nowhere and they started booking from us [Unintelligible] Rival started chasing them, like, well, we're not going to catch them, slow down."

Escarcega described the murder: "I was right there, fool, and fuckin I seen, well Jimmy's brother was right there. . . . And that fool [Camberos], he was shooting hoops he

looked suspicious though. You know, how some fool, like, and he has something right here blasted. So I'm like I'm going to hit that fool up dog. What's up fool what the fuck? I'm from King Kobras. So I took flight on him and Rival too and boom, boom, boom and Thumper is right there to make sure nobody jumped in. [¶] . . . [¶] . . . And fucking that fool booked it and we hit him in the corner and we were booking it. Pow pow pow." Escarcega said he told Rival to "get down, dump fool, pow, pow. . . " and Rival "shot like three times. Last one hit him, and that was it. We all ran boom. We were running, fool, that's when we see Thumper coming, wait for me, dog."

The informant asked Escarcega who pulled the trigger. Escarcega used his right hand to form the letter "R." The informant responded, "Fucking Rival." Escarcega said Gutierrez got "[a] lucky shot. I seen that hit too, right in the back of that fool. Because he was running you know so the blood was pumping." Escarcega said Gutierrez shot at Camberos three times, but he was only hit by the third bullet. The gun belonged to Ortiz, but he let other gang members use it, and Gutierrez had it that day. When the informant asked what they did with the gun, Escarcega responded, "Got rid of it quick." "Rival . . . threw it in the river and nobody, nobody ever went back to get it." Escarcega described the gun as a "nine." He said that afterwards, "C-Boy and Chunky came to scoop us up with Nina and them in the back seat." They all went to "celebrate" the murder. He added, "I remember Rival fucking crashing out because he drank too much hard liquor, you know, it's me, Thumper, Chunky, Nina, Tummy and Liz right there kicking it."

After the jail cell conversation, Detective Rodriguez interviewed Jimenez, who identified Escarcega in a photo line-up. Officers searched without success for the gun in the Rio Hondo riverbed.

Gang Evidence

Detective Rodriguez testified as a gang expert. He was assigned to the gang unit in Montebello for seven years and was part of the three-year-long Operation Sudden Impact investigation. Detective Rodriguez grew up around gang members in Montebello.

He had made contact with over 1000 gang members, including members of the Mexican Mafia. In 2010, there was a rivalry between the VNE and Southside Montebello gangs, involving numerous shootings and many unsolved gang-related murders. Reggie Rodriguez Park is in VNE territory, but Southside Montebello members would try to claim it by going there to "hang out" and tag the area with disrespectful graffiti. The King Kobras were another rival gang of VNE with a small presence in Montebello. VNE's derogatory name for the King Kobras was "Kit Kats." They called the Southside Montebellos "Monkeys."

Respect is a priority among gang members. Venturing into another gang's territory is not acceptable. It was important to VNE gang members to look for rivals who might be in their territory in what is known as "going out on patrol." VNE was trying to dominate and gain respect by committing assaults; the gang was responsible for many shootings in the area. VNE is known to be involved in shootings, possession of firearms, possession of narcotics, sales of narcotics, vandalism, auto theft, burglaries, and robberies. The gang members intimidated citizens within their territory to prevent them from reporting crimes. Snitching, or providing information to law enforcement, was not tolerated by gang members. Retaliation for snitching ranged from vandalism, assault, and murder.

Gang members often commit crimes in groups, with every member playing a role. It is common for the youngest member of the group to commit the most violence to prove themselves. Gang members respond with their gang affiliation when asked where they are from. If they are from a rival gang the immediate response is an assault. It is very common for gang members to carry guns. The more violent an individual gang member is, the more beneficial it is to the individual and the gang. "[A]ssault is one level, and then taken into the next level and actually murdering somebody, that is really sending a message to the community [that a rival gang member coming into their territory is not going to be tolerated.]" Violent acts garner status and respect within the gang. A shooting gets immediate respect.

Detective Rodriguez had numerous contacts with Escarcega, whose moniker was

"Smilely." He had also had contact with Ortiz, who went by the moniker "Thumper" and Gutierrez, who was known as "Rival." Escarcega was an admitted VNE member from the "Tic Toc" clique. He had gang tattoos. Detective Rodriguez had seen Escarcega in the company of Gutierrez and Garcia, as well as Robinson, C-boy, and Chunky. Ortiz was from the Primos clique. Ortiz also had numerous gang tattoos. The detective arrested Gutierrez for vandalism on March 27, 2010, for spray painting "VNE" and his gang name on the sidewalk on Lohart Street near the park.

Detective Rodriguez explained the meanings of several words and phrases used in gang culture. A "strap" is a gun. If someone refers to his "crimey" he is talking about a fellow gang member who has committed a crime with him. If a gang member has something "blasted" on him, it means he has a tattoo. If someone is "busted," he is incarcerated. "Dump" means to shoot. To "hit someone up" means asking for their gang affiliation.

DISCUSSION

Admission of Statements Implicating Codefendants

Proceedings

Prior to trial, Gutierrez moved to sever his trial from his codefendants. He argued that admission of Escarcega's out-of-court statements to the informant implicating him in the murder violated his Sixth Amendment right to confront witnesses under the *Aranda*/*Bruton* doctrine[8] and his right to due process. Gutierrez contended the statements Escarcega made to the informant were testimonial in nature and therefore in violation of the Sixth Amendment, as they were made in a custodial setting by an informant who was an agent of law enforcement. He argued the statements were also

[8] *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) and *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*), referred to jointly as *Aranda/Bruton*.

inadmissible under state evidentiary law because they were not sufficiently trustworthy. Ortiz moved to have Escarcega's statements to the informant excluded on the same grounds. Ortiz also moved to sever his trial or exclude the portions of the statements that incriminated him on constitutional grounds.

The prosecution argued that under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the Sixth Amendment was only implicated if the statements were testimonial. It sought to have the incriminating statements admitted under *People v. Arceo* (2011) 195 Cal. App.4th 556 (*Arceo*), *People v. Cervantes* (2004) 118 Cal.App.4th 162 (*Cervantes*), and *People v. Greenberger* (1997) 58 Cal.App.4th 298 (*Greenberger*), which held that a statement made to a confidential informant is admissible if it is nontestimonial and against the declarant's penal interest. The prosecutor argued that the statements were nontestimonial because Escarcega made them in a casual conversation with a person he believed to be a fellow gang member, a setting that lacked the solemnity and formality that define testimony. Further, the statements were admissible under California evidentiary laws because they were made in a noncoercive setting, by someone who did not objectively appear to be an agent of the police. An objective person in Escarcega's situation would not have believed that the statements would be used for law enforcement purposes. The statements were therefore sufficiently trustworthy to be admitted under the statements against penal interest exception to the hearsay rule.

Gutierrez distinguished *Arceo*, *Cervantes*, and *Greenberger* in his reply, arguing that none of those cases involved custodial interrogation, whereas Escarcega had been in jail and was interrogated by an agent of the police.

The prosecutor explained in detail how the statements contravened Escarcega's penal interests, and were therefore trustworthy. Escarcega admitted to gang membership, hunting for rivals that day, "hitting up" the victim to determine whether he was a rival, beating the victim, chasing him when the shooting occurred, and then celebrating the killing afterward. Even in the portions of the transcript that were not specific to the crime, defendant was referencing his gang membership and relationships within the gang.

The attorneys for Ortiz and Gutierrez primarily relied on the arguments in their

written motions. Ortiz's counsel added that the facts did not support the conclusion that the statements were nontestimonial and against Escarcega's penal interest. Escarcega and the informant had never met before, so there was no basis to assume that the two would speak freely. It was law enforcement's intent to question Escarcega about the crime and use his statements for future prosecution. Escarcega could not be expected to know the law of aiding and abetting, and would not understand that his statements were against his interests. To the contrary, his statements shifted responsibility for the actual shooting to Gutierrez. Gutierrez's counsel joined in these arguments and added that the informant appeared to be pumping Escarcega for information, as would be expected by an agent of the police. Escarcega's statements were not trustworthy. Escarcega was not speaking to a friend or family member, but instead was talking to a fellow gang member he was meeting for the first time, and was motivated to advance his status within the gang.

The prosecution responded that it was irrelevant whether Escarcega knew the statements were against his penal interest. It was also irrelevant that the informant was not a friend or family member. Case law establishes that a statement to a paid informant may be admissible if trustworthy and against the declarant's penal interest.

The court ruled that the statements were not testimonial, because they were not the equivalent of a police interrogation. Although the informant was an agent of the police and pumped Escarcega for information, the relevant question was whether a reasonable person in Escarcega's position would have believed his statements would be available for use at trial. The court found that a reasonable person would not believe he was being interviewed by police and the statements were not the equivalent of testimony. Although the statements were hearsay as to Gutierrez and Ortiz, they were subject to the exception for statements against penal interest. Under the exception, the declarant must be unavailable and must make statements that a reasonable person in his position would not make unless he believed them to be true. Escarcega was unavailable due to his privilege against self-incrimination. He told the informant what happened because they were from the same gang. It did not matter whether Escarcega understood the law of aiding and abetting. He understood "the law of the street." It was clear from his statements that he

understood he could be subjected to criminal liability for what he had done. Escarcega and the informant became "buddies" in the course of the conversation. They were in jail, but no police officers were present—the two of them were "just hanging out in the lock-up." The court did not interpret Escarcega's statement as shifting blame. Escarcega was narrating what happened to the informant.

Discussion

Gutierrez and Ortiz contend that, absent the opportunity for cross-examination, the trial court's admission of Escarcega's recorded statements to the confidential informant violated their constitutional right to confrontation under *Crawford*, and the *Aranda/Bruton* doctrine. They also question whether admission of statements against penal interest due to their "so-called trustworthiness" offends the Confrontation Clause, or alternatively, whether the statements were sufficiently trustworthy under Evidence Code section 1230.

Crawford

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" (*Crawford*, *supra*, 541 U.S. at p. 42.) *Crawford* held the Sixth Amendment right of confrontation is violated by the admission of out-of-court testimonial statements if the declarant is unavailable to testify at trial and the defendant has had no prior opportunity to cross-examine the declarant. (*Crawford*, *supra*, at p. 68.) The *Crawford* court abrogated *Ohio v. Roberts* (1980) 448 U.S. 56 (*Roberts*), which had held that statements of an unavailable witness against a criminal defendant could be admitted at trial only when the evidence falls within a "'firmly rooted hearsay exception,'" or when the statements contained "'particularized guarantees of trustworthiness,'" such that adversarial testing would add little to the statements'

reliability. (*Crawford, supra,* at p. 66.) *Crawford* explained: "The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused—in other words, those who 'bear testimony' 2 N. Webster, An American Dictionary of the English Language (1828). 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' *Ibid*." (*Crawford, supra,* at p. 51.) The *Crawford* court declined to further define "testimonial," but indicated that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations." (*Id.* at p. 68.) "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Id.* at p. 51.) *Crawford* held that testimonial statements were subject to the protections of the Confrontation Clause, noting that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law. . . ." (*Id.* at p. 68.)

In companion cases *Davis v. Washington* and *Hammon v. Indiana* (2006) 547 U.S. 813 (*Davis*), the Supreme Court considered the constitutionality of the admission of statements made by unavailable witnesses. The *Davis* court considered whether a police "interrogation" of a domestic violence victim by a 911 operator during and immediately following an attack produced testimonial statements, and concluded that it did not. (*Id.* at pp. 826-829.) It reasoned that "[the 911 caller] simply was not acting as a *witness;* she was not *testifying*. What she said was not 'a weaker substitute for live testimony' at trial. . . ." (*Id.* at p. 828.) The Court concluded the 911 caller in *Davis* was not attempting to establish past facts, but rather to describe an ongoing emergency. (*Ibid.*) In *Hammon*, a domestic violence victim filled out and signed a "battery affidavit" at her home in the course of a police investigation following an attack. As to Hammon the court held that the affidavit was testimonial because it was made under circumstances objectively indicating that the purpose of the statement was to establish past facts for the purpose of potential prosecution. "Statements are nontestimonial when made in the

course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id*. at p. 822, fn. omitted.) The Court explicitly held that the Confrontation Clause applies solely to testimonial hearsay: "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (*Id*. at pp. 821.) In the course of its discussion of the parameters of testimonial statements, the *Davis* court described "statements made unwittingly to a Government informant" and "statements from one prisoner to another" as "clearly nontestimonial." (*Id*. at p. 825.)

In *Michigan v. Bryant* (2011) 562 U.S. 344 (*Bryant*), the Supreme Court elucidated further on the testimonial/nontestimonial analysis: "An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose of the interrogation.' The circumstances in which an encounter occurs—*e.g.*, at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." (*Id*. at p. 360, fn. omitted.) "[Additionally,] the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry." (*Id*. at p. 374.) "[T]here may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." (*Id*. at p. 358.) "[W]hether an ongoing emergency exists is simply one factor . . . that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation. Another is . . .

formality[,] [which may] suggest[] the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to 'establish or prove past events potentially relevant to later criminal prosecution,' [citation], [although] informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent." (*Id*. at p. 366.) Ultimately, the question is whether, viewing all of the circumstances objectively, the "primary purpose" of making the statement was to "creat[e] an out-of-court substitute for trial testimony." (*Id*. at p. 358.)

Defendants argue that Escarcega's statements were testimonial and therefore inadmissible under *Crawford* because they were elicited by an agent of the police for the purpose of prosecution, while Escarcega was in a custodial setting and would not have felt free to end the conversation. We disagree.

As the Supreme Court's precedent teaches, no single factor is dispositive to our analysis under *Crawford*. That the statements were elicited by an agent of the police does not mandate that they be considered testimonial. In *Bourjaily v. United States* (1987) 483 U.S. 171, 181-184 (*Bourjaily*), decided before *Crawford*, the United States Supreme Court held that admission of statements made unwittingly to a government informant did not offend the constitution. *Davis* later noted that the statements in *Bourjaily* were "clearly nontestimonial," despite the fact that the case had been decided under the standard articulated in the repudiated *Roberts* test. (*Davis*, *supra*, 547 U.S. at p. 825.) The *Davis* court "consider[ed] the[] acts [of 911 operators] to be acts of the police" for purposes of the opinion (*id*. at p. 823, n. 2.), yet held that a police interrogation conducted in the course of a 911 call is not testimonial in every circumstance (*id*. at p. 822).

The intent of the informant and/or law enforcement is not considered in isolation when determining the primary purpose of an interrogation. The declarant's intent must also be taken into account. (*Bryant*, *supra*, 562 U.S. at pp. 367-370.) Here, although it is clear that the police and the informant intended to elicit statements for future prosecution, Escarcega was entirely unaware of their intentions. He and the informant spoke in an easy, friendly manner, for a substantial time period. The two had many associates in common, and were catching up on what others in the gang were doing. The manner and

the tenor of the conversation strongly indicated it was a casual interaction, not a means to provide information to police for use in future prosecution. Moreover, gang culture dictates that fellow gang members not "snitch" on one another. In Escarcega's circumstances, a reasonable person would have believed the conversation would be kept in confidence.

Although he was in custody, Escarcega was under no compulsion to speak with the informant. He initiated the conversation about the murder by telling the informant that he thought it was the reason he had been transferred back to California. As the trial court observed, his behavior was consistent with someone "hanging out in lockup." The conversation was lacking in the formality and solemnity that that are the hallmarks of testimonial statements. Gutierrez and Ortiz's Sixth Amendment rights were not implicated.

Aranda/Bruton

Defendants insist that, even if *Crawford* does not bar the statements' admission, they are inadmissible under the *Aranda/Bruton* doctrine, to which *Crawford*'s testimonial requirement does not apply. This argument also fails.

The *Aranda*/*Bruton* doctrine bars admission of a nontestifying codefendant's confession that is inadmissible hearsay as to the defendant at their joint trial under the Sixth Amendment. (*Bruton*, *supra*, 391 U.S. at pp. 135-137; *Aranda*, *supra*, 63 Cal.2d at pp. 529-530.) *Bruton* was decided well before *Crawford* and *Davis*, but was not mentioned in either case as conflicting with the Supreme Court's interpretation of Sixth Amendment protections.

Although defendants argue that whether *Crawford's* testimonial restriction applies to the *Aranda*/*Bruton* doctrine is an unsettled question, the issue was addressed by Division Eight of this court which held: "[T]he confrontation clause has no application to out-of-court nontestimonial statements (*Whorton v. Bockting* (2007) 549 U.S. 406, 420 (*Whorton*); *People v. Gutierrez* (2009) 45 Cal.4th 789, 812), including statements by

codefendants. (*United States v. Figueroa-Cartagena* (1st Cir. 2010) 612 F.3d 69, 85 (*Figueroa-Cartagena*) [*Bruton* must be viewed 'through the lens of *Crawford* and *Davis*;' if the challenged statement is not testimonial, the confrontation clause has no application]; see also *U.S. v. Johnson* (6th Cir. 2009) 581 F.3d 320, 326 ['[b]ecause it is premised on the Confrontation Clause, the *Bruton* rule, like the Confrontation Clause itself, does not apply to non-testimonial statements'].)" (*Arceo, supra*, 195 Cal.App.4th at pp. 571-572.) The *Arceo* court noted that "California courts before and after *Crawford* have held that the admission of statements possessing sufficient indicia of reliability to fall within the hearsay exception for declarations against interest does not deny a defendant the right of confrontation guaranteed by the United States Constitution. (*Cervantes* [, *supra*,] 118 Cal.App.4th [at pp.] 176-177 ; *Greenberger* [, *supra*,] 58 Cal.App.4th [at pp.] 330-331.)" (*Arceo, supra*, 195 Cal.App.4th at pp. 571-572.) "*Crawford, Davis*, and *Whorton* mean what they say—the confrontation clause applies only to testimonial statements—and nothing in the cases applying that principle to extrajudicial statements by nontestifying codefendants is inconsistent with or purports 'to overrule *Bruton*,' which itself did not address 'any recognized exception to the hearsay rule.' (*Bruton, supra*, 391 U.S. at p. 128, fn. 3.)" (*Arceo, supra*, at p. 575.)

We agree with the analysis of the *Arceo* court. Escarcega's nontestimonial statements did not implicate the *Aranda/Bruton* doctrine in this case.

Trustworthiness

Both before and after *Crawford* and *Davis*, California courts have upheld admission of statements against penal interest that meet the exception to the hearsay rule in Evidence Code section 1230, based on compliance with the statute, and the statements' trustworthiness, which meets constitutional requirements. (*Arceo, supra*, 195 Cal.App.4th at p. 577; *Cervantes, supra,* 118 Cal.App.4th at p. 177; *Greenberger, supra*, 58 Cal.App.4th at pp. 330-331.)

Defendants argue that California cases upholding admission of statements against

penal interest under Evidence Code section 1230 based on their trustworthiness have applied the United States Supreme Court's defunct rule in *Roberts*, *supra*, 448 U.S. 56, which required statements to possess sufficient indicia of reliability to meet constitutional requirements under the Confrontation Clause. Contrary to defendants' assertions, the cases following *Davis* acknowledge that *Roberts* is no longer good law.

In *Arceo*, the court noted that, "'[The United States Supreme Court] has made clear that *Roberts* . . . and its progeny are overruled for all purposes, and retain no relevance to a determination whether a particular hearsay statement is admissible under the confrontation clause . . . . Thus, there is no basis for an inference that, even if a hearsay statement is nontestimonial, it must nonetheless undergo a *Roberts* analysis before it may be admitted under the Constitution.' (*People v. Cage* (2007) 40 Cal.4th 965, 981-982, fn. 10, citation omitted.)" (*Arceo, supra*, 195 Cal. App.4th at p. 573, fn. 8.)

"In *Cervantes, supra*, 118 Cal.App.4th 162, the court, relying on *Crawford* and *Greenberger*, explained that *Crawford* recognized that if the statement at issue is nontestimonial, the rules of evidence, including hearsay rules, apply; state courts may consider '"reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial. [Citation.]" [Citation.]' (*Cervantes*, at p. 173.)" (*Arceo, supra*, 195 Cal. App.4th at p. 573.) Thus, trustworthiness is a proper consideration when evaluating whether a statement meets our state's evidentiary requirements.

Evidence Code Section 1230

Finally, defendants argue that even if trustworthiness is a proper consideration, the statements at issue are not sufficiently trustworthy to be excepted from the bar on admission of hearsay evidence.

Pursuant to Evidence Code section 1230, "'[e]vidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the

hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.' ([Evid. Code,] § 1230.) The proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611 (*Duarte*).)

Here, we are concerned with whether the statements Escarcega made to the informant were trustworthy, or made for the purpose of shifting blame to his codefendants. The parties agree that Escarcega was unavailable as a witness because he exercised his right against self-incrimination, and defendants have not argued that he did not incriminate himself in his statements.[9]

"'To determine whether [a particular] declaration [against penal interest] passes [Evidence Code] [section 1230's] required threshold of trustworthiness, a trial court "may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant."' [Citation.] We have recognized that, in this context, assessing trustworthiness '"requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception."' [Citation.]" (*Duarte, supra,* 24 Cal.4th at p. 614.)

"There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against [penal] interest exception. The trial court must look to the totality of the circumstances in which the statement was made, whether the

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[9] Defendants note the prosecution "professed" to be unable to locate the confidential informant, who "skipped out on a subpoena" and was therefore unavailable for cross-examination; however, "'[I]t is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.' [Citation.] . . . . An interrogator's questions, unlike a declarant's answers, do not assert the truth of any matter." (*Bryant, supra,* 562 U.S. at p. 367, fn. 11.)

declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry." (*Greenberger*, *supra*, 58 Cal.App.4th at p. 334.) "When examining what was actually said by the declarant special attention must be paid to any statements that tend to inculpate the nondeclarant. This is so because a statement's content is most reliable in that portion which inculpates the declarant. It is least reliable in that portion which shifts responsibility. Controversy necessarily arises when the declarant makes statements which are self-inculpatory as well as inculpatory of another. This is why Evidence Code section 1230 only permits an exception to the hearsay rule for statements that are specifically disserving of the declarant's penal interest. [Citation.] This is not to say that a statement that incriminates the declarant and also inculpates the nondeclarant cannot be specifically disserving of the declarant's penal interest. Such a determination necessarily depends upon a careful analysis of what was said and the totality of the circumstances." (*Id*. at p. 335.)

The totality of the circumstances lead us to conclude that Escarcega's statements to the informant were trustworthy. Escarcega had personal knowledge of the events. He participated in the murder and personally witnessed what he described. Escarcega told the informant that he had been hunting for rivals all day, had "hit up" Camberos to determine whether he was from a rival gang, beat Camberos when he learned that he was a King Kobra gang member, chased Camberos from the park, told Gutierrez to shoot Camberos, and celebrated the killing with other gang members afterward. His statements were facially self-incriminating, which is one of the """particularized guarantees of trustworthiness."""" (*Greenberger*, *supra*, 58 Cal.App.4th at p. 329.) Escarcega had no apparent motivation to lie. He was commiserating with someone he believed was a fellow gang member about the reasons for his incarceration. Escarcega did not know the informant was working with police and did not know that their conversation was being recorded. He had no reason to believe that the informant would share the information with police. In gang culture, fellow gang members support each other and do not "snitch" to law enforcement. Escarcega had no cause to minimize his role in the murder.

Gang members increase their reputations within the gang by committing crimes, and the more serious the crime, the greater the reputation of the member who commits it becomes. If anything, Escarcega had incentive to exaggerate his part in the murder to impress the informant. Viewed in context, his statements to the informant cannot be construed as shifting blame to either of his codefendants, because a reasonable person in Escarcega's position would not believe that he would be any less guilty for encouraging a murder and hunting down a victim than they would be for committing the actual shooting. As explained by the trial court, it did not matter whether someone in Escarcega's position could be reasonably expected to understand the law of aiding and abetting, because they would certainly be aware of "the law of the street." Escarcega belonged to a notorious gang with a number of murders to its name. It is inconceivable that any member of VNE would not understand that everyone who participates in a murder is equally liable given the gang's activities. Escarcega showed awareness of his culpability when he asked the informant to tell Ortiz he was the only one who was not "busted," and said, "It is what it is. I can't take it back."[10]

Reasonable Diligence in Attempting to Produce the Confidential Informant

Defendants argue that the trial court failed to require the prosecutor to show she used reasonable diligence to procure the attendance of the informant at trial. In their briefs, defendants provide what is, at best, a poorly-balanced and cursory account of the relevant proceedings. They describe the prosecutor as "priming" the jury to hear the informant's testimony in her opening statement, and characterize her decision not to call the informant as "last minute" and having the effect of displeasing the court, with the

[10] In determining whether the statements are trustworthy, we do not consider whether other evidence presented to the jury corroborates Escarcega's statements as the People argue. "In determining the particularized guarantees of trustworthiness, consideration of corroborating evidence is inappropriate since that would constitute 'bootstrapping on the trustworthiness of other evidence at trial.' [Citation.]" (*Greenberger*, *supra*, 58 Cal.App.4th at pp. 335-336.)

implication that the prosecutor had the nefarious purpose of lulling them into believing that she intended to call the informant as a witness, and then depriving them completely of the opportunity to examine or cross-examine the informant. Defendants describe her efforts at producing the informant after they requested to call him as a witness as "desultory," relying on her statement that "efforts weren't made because we cannot locate him," as evidence that she was not diligent in her efforts and that the trial court abdicated its duty to determine what steps she had taken to ensure the informant's availability.

We recount the proceedings in full, limiting our consideration of defendants' arguments to those raised both before the trial court and in the opening briefs. We conclude the informant was not a material witness, the trial court properly ascertained that the prosecution exercised reasonable diligence to ensure his availability, and any error was harmless beyond a reasonable doubt.

Proceedings

In her opening statement, the prosecutor told the jury that an informant had been involved in the case. "[Y]ou're going to hear that defendant Escarcega talked to this informant very openly about his involvement and the other defendants' involvement in this particular murder. [¶] You're going to hear it. [¶] You're going to see the transcript of it. [¶] But most importantly you're going to hear the tape of what is being said about why this crime was committed." "[T]he conversation is a taped conversation between defendant Escarcega and the informant." "[Y]ou're going to hear it during trial, the statement that defendant Escarcega gives."

On Tuesday, February 10, 2015, Gutierrez's counsel raised the issue of whether the informant's past conduct could be introduced to impeach his credibility as a witness. He requested arrest reports for the informant from the prosecution. The prosecutor stated that she did not have arrest reports for the informant. The trial court inquired whether she could obtain them, and the prosecutor responded that she did not know. The court requested that the prosecutor attempt to obtain the reports to avoid having the jury wait

for the defense to get them. The trial court asked if the prosecutor intended to call the informant that day and she responded that she did not. There was an off-the-record discussion, and when the discussion resumed on the record, the trial court summarized, "[O]ff the record you told me you didn't know when [the informant] is going to testify. [¶] If he doesn't testify tomorrow, then we have, I think, five days of break over which I would like you to, please, try your best to get that information -- these arrest reports. You might not be able to get all of them, I understand the issues, but I'd like for you at least to try so that we can have a basis to have a hearing; and I'd also like to be able to know how long that hearing is going to take and figure out a time to do it. [¶] So I don't want [the informant] to show up here Tuesday morning, and I have to keep the jury waiting while we do that."

On the next day of trial, Tuesday, February 17, Gutierrez's counsel inquired about the informant's criminal records:

"[Gutierrez's Counsel:] Since it appeared that . . . [the informant] may testify either tomorrow or Thursday, I'm moving the court to order the prosecutor to disclose the arrest reports to us because there's an attempted murder arrest for [the informant], and that would be relevant for cross-examination if he testifies. [¶] Because I don't know if the People are just going to play the recording and not call [the informant] or if they're going to call him as a witness. I just don't know which way they're going to go.

"[The Prosecutor:] Right. And in light of what we discussed last week, it's my intention to call Detective Rodriguez and not the informant to the stand. And I anticipate we may be done as early as tomorrow.

"[The Court]: And [can you confirm] that [Detective Rodriguez] hear[d] this [recording] in real time?

"[The Prosecutor:] Correct.

"[The Court]: All right. [¶] In which case we don't need the reports.

"[Gutierrez's Counsel:] Well, that would make it null and void, yes.

"[The Court]: Okay. All right. [¶] [If] [t]hat changes, [prosecutor], let the defendants know."

There were no further comments from defense counsel on the matter that day. On Thursday, February 19, shortly after Detective Rodriguez took the stand, Escarcega's counsel, joined by counsel for both codefendants, objected to Detective Rodriguez testifying regarding the recorded conversation between Escarcega and the informant. He argued that the prosecution needed to establish the relevance and foundation for Detective Rodriguez's testimony. The prosecutor explained that there was no issue with foundation because Detective Rodriguez put the wire on the informant, placed him in the cell, and watched the recording in real time. She argued, "I don't have to call the informant if I don't have a problem laying the foundation for the tape . . . ." The court added that Detective Rodriguez could testify to what he heard Escarcega say, if he heard anything. The issue was what the detective had heard. The prosecutor pointed out that the recording began with the detective wiring the informant, walking him to the cell, and releasing him to the jailer, which continued directly into the conversation between Escarcega and the informant. The court instructed the prosecutor to resume examination, so that it could be determined how much of the conversation the detective heard. "[A]ll he needs to say is I heard the whole thing, but if he was gone for five minutes, then that is a different story."

Detective Rodriguez testified that he listened to the entire conversation between Escarcega and the informant as it occurred over a speaker that had been wired for that purpose in the K-9 room next to the cell. He downloaded the recording afterward and listened to it several times, and confirmed that the recording accurately reflected the conversation in the cell.

All counsel submitted on foundation, and the court ruled that the recording could be played for the jury. Ortiz's counsel objected on confrontation and due process grounds. He argued that neither Ortiz nor Gutierrez had been identified up to that point in the trial, so the "circumstances surrounding the relationship" of Escarcega and the informant were crucial. The informant could not be cross-examined on his past, his character, or "the situation as it was occurring in the cell." Defendants would not have the opportunity to question the informant as to whether his statements were true, or

whether he and Escarcega were "just shooting lies back and forth."

The trial court asked the prosecutor whether the informant would be available as a witness if the defense wanted to call him to testify. She responded that she had not asked, but that she would check with the Montebello Police Department. She said she was "not standing in the way of a witness's availability for this trial." The court suggested that the prosecutor ask Detective Rodriguez off the record to check on the informant's availability. She explained that the detective could not give an immediate answer because they would still have to reach out to the informant's handler to contact him.

Defense counsel then moved to have Detective Rodriguez's testimony regarding the jail cell conversation limited to foundational issues, stating that "the People should not be allowed to allow the detective to provide a summary of what was said." The prosecutor responded that it was her intention to play the entire recording with the exception of the portions that the court ordered be redacted. She intended to ask Detective Rodriguez "about certain meanings of words[,]" and "what he had told the informant before he was put in the cell, and that is essentially it. [¶] The tape speaks for itself."

Gutierrez's counsel argued that his planned defense was that the informant "was telling falsehoods to induce [Escarcega] to make statements," "which had the effect of implicating Mr. Gutierrez." "So I would ask the People to request to subpoena [the informant] to court so we can cross-examine him for trial." Escarcega's counsel added that because of statements the prosecutor made in her opening statement—"that there was a snitch and an informant, and that Mr. Escarcega made statements to him and was very talkative"—the defense had been lead to believe that the informant would testify. Since that time the defense had been requesting police reports for the informant but had not received any.

Escarcega's counsel represented that he e-mailed the prosecutor following the conversation in which she was asked to obtain the informant's arrest reports, and requested that the prosecution keep the informant under subpoena if he was under

subpoena already, and if he was not, provide the informant to the defense so that they could subpoena him. Escarcega's counsel also requested that the defense be permitted to cross-examine Detective Rodriguez in the informant's absence "on all payments that were made in [*sic*] favors that were given to [the informant] whether [the informant] broke the agreement between him and the Montebello Police Department by his actions, and his the [*sic*] prior convictions . . . ."

The prosecutor stated that she had already provided the defense with all the information she had on payments to the informant, but she objected to the defense cross-examining the informant on the payments because he was not testifying. She argued that the informant was not a material witness. The court responded, "Well, clearly he is the most material witness." The prosecutor disagreed: "He is not material at all. [¶] He wasn't present for the crime. [¶] The only thing he went in a jail cell where we already have a tape of it . . . . [T]o open the door to this informant or any other informant in any other case would be irrelevant unless he were testifying it is his credibility that were [*sic*] being impeached and I have not hidden from the jury or from anyone the fact that he was a paid informant . . . . [T]o broaden the scope and bring in all of this impeachment evidence on a witness who is not even taking the stand is not allowed under the law I have never seen it happen I would like to see [the case law defense counsel is relying on]."

The court responded that it would look at the case law but that in the meantime the prosecutor should make the informant available to the defense to call as a witness. If he was not available they would revisit the issue of impeachment. The court asked the prosecutor whether she would be able to obtain information on the informant's prior conduct. She responded that she had spoken with her office about it but that she did not know if they would be able to get the information. The trial court stated that if the informant was produced "then probably it is fair game to ask him about any of the moral turpitude things that are listed in there the rap sheet."

The prosecutor expressed confusion, to which the court responded, "Let's find out if he gets here first." The prosecutor replied, "Gets here you are asking me to make him

available so the first thing I have to do is make contact with Montebello [Police Department] to see if they can get [the informant] and make him available and then advise him [t]hat the defense may want to call him or may want to speak to him and that is the extent of what I can do . . . ." The court asked how the defense was supposed to subpoena the informant at this point in the trial. The prosecutor responded that "[i]t won't be an issue if I have him under subpoena and I can make him available then I will provide him to the defense I will make him available . . . ." She believed he was under subpoena because she subpoenaed him before the trial started. The court replied that Detective Rodriguez "need[ed] to go and put these wheels in motion so we don't waste any more time. [¶] So go make whatever . . . phone calls he needs to make or you need to make [before we resume direct examination]." "I have to figure out where he is, so that is what I want you to do now. [¶] We will take a recess for five minutes to get those wheels in motion. [¶] . . . [M]ake the phone calls you need to make as fast as you can make them."

The prosecutor responded: "Just so I understand because now I need to get my office involved in this. [¶] I have to make calls with respect to Montebello [Police Department] he is also a federal [informant] involved with federal work. [¶] I don't know if the handler[']s both Montebello [Police Department] and the federal agent it may not be a 5 minute phone call. [¶] This all just happened right now. [¶] If you are asking me to make this witness available I will make every effort to make the witness available to the defense."

Gutierrez's counsel interjected that "the Sixth Amendment right to confrontation trumps any of this difficult[y] of getting office permission or talking to the Montebello police chief." Counsel stated that they had a name and birth date for the informant and had "found out more information about him" but did not have his address. He wanted the prosecutor to have the informant in court the next morning for examination as a witness. "[Guiterrez] has a right to confront his accusers."

The court addressed the prosecutor: "[Y]ou don't have to go through all these steps." "Make one phone call and have the detective make one phone call and tell the

people who ha[ve] him he needs to be here."

The next day, Friday, February 20, Escarcega's counsel reported that the informant had not yet been made available to him. The prosecutor explained, "A call was made. He was unavailable today. And we called back, 'we' meaning the handler, to find out what unavailable meant to get more detail, and he has not returned the call." The court instructed defense counsel to cross-examine Detective Rodriguez and "see what happens."

After testimony was concluded for the day, the court asked what defense counsel would like to do about the informant's continued unavailability. Escarcega's counsel said, "I'd like to know the reason why he's not being called since he was named as a witness." The court responded that the prosecutor was under no obligation to share that information. Defense counsel then reiterated that if the informant was not available defendants would want access to arrest records for impeachment purposes. Defense counsel stated they would still like to subpoena the informant. The court asked the prosecutor if that would be possible and she responded, "He probably can't. . . . [T]he informant has been relocated four different times. The address is not something that we would be inclined to divulge. We are making efforts as the court has requested to get in contact with this witness. He is not responding to phone calls that are being made to him as of yesterday. [¶] So at this point, we are making our best efforts. If counsel had wanted him under subpoena, that should have happened before this trial started." "[A]t that time, we would have handled either making sure that we had him under subpoena or we could have produced him and put him under subpoena to counsel. [¶] We had him at one point so that could have all been handled before this trial started . . . . We have not had the contact that we thought we were going to have as of yesterday. So I don't know how else I -- what else I could say." She continued to object to the requests for arrest records on the ground that the informant was not a material witness.

The court responded "don't make that objection now . . . so far, that's premature." The court explained that it understood the prosecution's objection was to impeachment of someone who was not a witness, but that it believed it could "make some kind of a

remedy if the witness is just not available[,] [¶] . . . but we're not there yet."

Gutierrez's counsel argued that it was customary for defense attorneys to ask the prosecution for contact information for a witness, and for the response to be that the prosecution intends to call them and that there is no need for a subpoena. "And we're relying upon if the [District Attorney] tells us they're coming to court, they'll come to court. [¶] So in the People's trial brief, they list [the informant's name] as a witness. He's not confidential. He's not secret. It's [the informant's name]. He's a witness in the case. It wasn't until Tuesday when it appeared to me, at least, I can't speak for my co-counsel, that the People made, at that point, a tactical decision not to call [the informant]." "So we relied upon these representations, and we think it's disingenuous to say, well, we could have subpoenaed them when we don't have any information to subpoena the witness[]."

The prosecutor responded, "I would have, again, made [the informant] or any one of the 30 some odd witnesses that are on that witness list who I haven't called in this case available to the defense if I was in a position that I didn't want to disclose an address. . . . That's not the issue. [¶] And when the court asked me yesterday to make efforts to make that witness available, I represented to the court and to counsel I'll make every effort to make him available. I'm not going to stand in the way of defense counsel calling him. [¶] Of course, I'm going to ask for an offer of proof because this looks like a fishing expedition to me. . . . Regardless, I would make him available and defense counsel could speak with him or call him to the witness stand if the court allowed that. [¶] I can't even get a hold of this witness right now. So it's not a position that we would not have been in already; and the only difference would be had they really wanted to call him as a witness in this case, they would have come to me before this trial started and said, do you have this witness, and are you for sure calling him; and if not, can you make him available. [¶] And not a single attorney here did that. . . . This is a situation where now all of a sudden they were hoping I'd call this witness, and I'm not calling this witness among many others."

The court said that "Somebody in law enforcement knows where this person is."

The prosecutor replied: "I don't know that that's true, your honor. I would hope that that was true, but I can't make that representation." The court noted that the handler or someone must have the last known address and that, "somebody needs to at least make the effort, if it's not in Los Angeles County or even in the State of California, to contact somebody in law enforcement wherever that person is, and drive out to that location where the person is, and see if they can find the person and try to make that person available because they want to call him. [¶] And if he's not going to be here, which it seems likely he won't, then we'll talk about what remedies, if any, there are. . . . [S]o see if they can find him . . . ."

On Monday, February 23, the prosecutor asked the court for its ruling on what information could be admitted to impeach the informant. The court asked the prosecutor if she had been able to find out where the informant was. She responded, "No, I did not because efforts weren't made because we cannot locate him." The court responded that "the informant's prior convictions are probably not relevant to this, not admissible because the only relevance is to impeach the credibility. . . . [I]t's not fair to basically dirty up a witness who is not here to defend himself." The court said it would allow evidence of incentives and payments to the informant to be admitted. The court permitted the prosecutor to be heard on the matter.

The prosecutor responded: "[T]his informant is not a material witness under the law. I know the court feels that he is an important witness, but under the law legally speaking a material witness would be someone who would either be present at the scene or has some or has some valuable information to provide. [¶] In this particular case the informant is simply someone who had been wired up and sent into a jail cell with defendant Escarcega. The entire recording of which all counsel has and it's been played for the jury. [¶] So any issues that the court has brought up regarding whether there was some bias or some motive would be irrelevant to the issue of whether or not defendant Escarcega made this statement to the witness. [¶] And so based on that, I don't think that any information regarding the informant whether he was paid, whether he had done other operations with respect to this case or anything else, would be relevant, and under

[Evidence Code section] 352 I would ask that you exclude it."

Escarcega's counsel countered: "[T]he defense would have called the confidential informant if the prosecution did not, and that we would be able to get a fair picture to the jury just what this informant was. If we called him, we'd certainly be able to impeach him with his prior convictions, and the fact that he has signed agreements for payment for this case and possibly others. [¶] So the fact that he's not here, and even if he is not called to the prosecution, this guy skipped out on a subpoena, I don't think we should send a false picture to the jury as to who the confidential informant is. I would ask that we be able to impeach or ask about any payments or relocation fees that were paid to this informant."

Ortiz's counsel joined in Escarcega's arguments and added: ". . . I do think there is a confrontation issue and [the prosecutor] stated, well, we didn't have this witness under subpoena but that's because the People did, and the court can see that up until, you know, whether I think it was last Tuesday, everyone was under the understanding that this witness would be here last week or today, and we were all under that understanding and all under the belief that we would be asking these questions of the witness, and to now be unable to do that, I think is unfair to my client, and I think it would violate his rights to due process and confrontation."

Guiterrez's counsel joined in the arguments of co-counsel and submitted.

The prosecutor added: "With [Ortiz's counsel] stating that, you know, he would have called this witness to the stand, I find very interesting. First of all, none of the lawyers ever inquired as to whether or not I was going to call this informant to the stand in this trial. None of the lawyers ever asked for me to make that witness available and no one ever asked if I was going to have that person under subpoena. [¶] Now at this point I am sure that they have been waiting so that they could cross-examine that particular witness, but when he said he would have called that witness, I would be asking simply for an offer of proof as to what exactly he'd be calling that witness for. Because the arguments that I hear sounds like they would be wanting to call the witness simply to impeach him, and that would not be a material reason to call the witness to the stand. [¶]

As I've stated, this witness was strictly someone who wore a wire and so at that point what becomes relevant and pertinent in a trial like this is the materiality of those who testified and this particular witness isn't material. If he was, I would be [the] one, calling him. Two, I can't even find him. I can't even call this person to the stand right now. We've been looking for him. He has gone into hiding. [¶] So it's not just the defense who now claims that they so-called want to call him, which I don't believe. I think what they were really hoping for is cross-examination of him and I can't even give him that."

The court asked defense counsel for offers of proof. Escarcega's counsel stated: "[T]his informant could verify or not the process by which this recording took place, how it was set up, whether or not he could give us information as to whether or not the testimony of Detective Rodriguez is true and accurate. There may be other variations if he was to testify as to exactly how this recording occurred. [¶] Secondly, this particular informant seemed to have information about people out in the neighborhood that he was asking questions, and he may have been able to confirm or he may have been able to cast inconsistencies from some of the other witnesses that were called."

Ortiz's counsel joined, and added that defense counsel were "signaled" that the informant would be called when the prosecutor provided his name, birth date, and impeachment information. Defense counsel were not aware that law enforcement was listening to the recording in real time. The informant had "the best idea of what kind of conversation [he and Escarcega] were in fact having, whether it was a truthful conversation or not . . . ." "[F]or the detective to be allowed to testify about what certain words mean is helpful, but it doesn't really get to the believability of that conversation and that's what is at issue."

Gutierrez's counsel joined in co-counsel's arguments.

The prosecutor responded, "This informant because he's not material would not give any information that would go to the inconsistency of what other civilian witnesses gave in this case. He wasn't present at the time of the crime. . . . [¶] The other it that evidence of whether or not this tape was done in real time, that particular informant would not be able to testify to that. He is not behind the mechanics of what is going on

with being wired up. He just gets wired up and goes and is put in a cell. So he can't talk about what Detective Rodriguez or the other detectives are doing while that individual is in the particular jail cell and the tape speaks for itself. [¶] So this informant the offer of proof that he's going to take the stand and be able to give some veracity to defendant Escarcega doesn't make any sense. The jury was provided the tape. They'll be the ones to decide whether or not he was being truthful."

The court ruled that the defense could question Detective Rodriguez about the payments made to the informant, but that he could not be asked about prior convictions. In voir dire the jurors were asked about people getting inducements, "[s]o everybody came into this case with the idea that this witness was going to testify. So that's the ruling."

Law

A criminal defendant has the right under both the federal and state constitutions "to be confronted with the witnesses against him." (U.S. Const., 6th Amend.; *Pointer v. Texas* (1965) 380 U.S. 400, 406.)

"In *Eleazer v. Superior Court* (1970) 1 Cal.3d 847 [(*Eleazer*)], the California Supreme Court held that due process requires that the police or prosecuting authority 'make such inquiries and arrangements as are reasonably necessary to enable the prosecution and defense to locate [an informer who is a material witness whose testimony might be helpful to the defense].' [Citation.]" (*People v. Hernandez* (1978) 84 Cal.App.3d 408, 409-410.) "[A]lthough the prosecution need not produce the informer as a witness, it cannot withhold information which might assist the defense's efforts to locate and produce him." (*Eleazer*, *supra*, 1 Cal.3d at p. 851, fn. omitted.) "[W]here it is likely that the informant cannot be located by merely providing the last known address, the trial court is under an obligation to ascertain whether the prosecution has more information and whether it has made reasonable efforts to obtain information useful in locating the informant. This obligation is necessarily required to implement the mandate

of our decision in *Eleazer*, which 'recognized the futility of a rule requiring disclosure of the information which the police know about a material witness informer without a further requirement that the police make efforts to obtain information useful in locating the informer as well.' [Citation.] Fairness to the accused requires that the prosecution bear the burden of showing that it has made reasonable efforts to maintain contact with the informant." (*Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 366-367.) "[F]airness to the accused outweighs the informer's interests in anonymity if and when he becomes a material witness on the issue of guilt." (*People v. Goliday* (1973) 8 Cal.3d 771, 781.) An informant is a material witness when "there is a reasonable possibility that he could give evidence bearing on defendant's guilt that might exonerate defendant of the criminal charge." (*People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1043.) "[W]hen the informer is shown to have been neither a participant in nor a nonparticipant eyewitness to the charged offense, the possibility he could give evidence which might exonerate the defendant is even more speculative and, hence, may become an unreasonable possibility." (*People v. Lee* (1985) 164 Cal.App.3d 830, 836.) The defendant bears the burden of showing that the informer may be a material witness on the issue of defendant's guilt or innocence. (*Theodor v. Superior Court* (1972) 8 Cal.3d 77, 88.) "That burden is discharged, however, when defendant demonstrates a reasonable possibility that the anonymous informant whose identity is sought could give evidence on the issue of guilt which might result in defendant's exoneration." (*People v. Garcia* (1967) 67 Cal.2d 830, 839-840.)

We independently review the trial court's determination that the prosecution's efforts to locate an absent witness were reasonable. (*People v. Cromer* (2001) 24 Cal.4th 889, 901.) Any error is reviewed under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Thomas* (1975) 45 Cal.App.3d 749, 755.)

Discussion

Defendants' arguments that the informant was a material witness include that: (1) the informant was an "accuser" whom they had the right to confront; (2) the informant induced Escarcega to make false statements with his questions; (3) the informant could verify whether Detective Rodriguez accurately described the process he followed to record the jail cell conversation; and (4) the informant could provide information about people in the neighborhood and possibly discredit their testimony. We conclude that the informant was not a material witness, because there is no reasonable possibility that he could give evidence bearing on defendants' guilt that might exonerate defendants of the criminal charges.

The informant was not an "accuser." His statements were not offered for their truth, and to the extent that the jury may have believed any of the statements were true, this could have been remedied by a limiting instruction as the prosecutor suggested. None of the statements the informant made were related to the crime. He was not a percipient witness and did not indicate that he had seen anything or knew anything about the crime firsthand on the recording.

It is irrelevant whether the informant's statements to Escarcega were true. Even if he was attempting to induce Escarcega to make false statements by "trading lies," he was not in any better position than the jury to determine whether Escarcega was lying or telling the truth. His lay opinion would be mere speculation. If defense counsels felt it was important to inform the jury that it is common to trade lies and exaggerate within gang culture, they could have provided expert testimony on gangs. The particular question of Escarcega's truthfulness had to be determined by the jury.

The informant's knowledge, if any, of how the audio and video recordings were accomplished other than that he was personally wearing a wire, is irrelevant. He was in the cell, not in the K-9 room where the recording was being broadcast. The recorded conversation was shown clearly on the video. Whether the informant understood the mechanics of this aspect of the investigation was not a matter of any importance.

There was no information that the informant could provide to discredit the testimony of witnesses at the scene, because he was not present. As the prosecutor repeatedly argued, the only role that the informant played was being wired and having a conversation with Escarcega in the cell. That process was video- and audio-recorded from beginning to end. The jury could watch and hear the recordings and make its own findings regarding what occurred.

The trial court required the prosecution to show it exercised due diligence in its attempts to secure the informant, and it ascertained what steps the prosecutor took in that process. We have set forth the prosecutor's steps above in great detail. The trial court could reasonably conclude there were no further steps that she could take because the informant had made himself unavailable and "gone into hiding," and our independent review of the record is consistent with this conclusion.

Assuming there was error in the process relating to production of the informant as a witness, the error is harmless beyond a reasonable doubt. Escarcega's statements implicated all three defendants in the murder and were consistent with every other piece of evidence offered at trial. He corroborated witnesses who said that the three men approached Camberos and one of the shorter men "hit him up" to find out what gang he was from, to which Camberos answered he was from the rival King Kobras gang. He also corroborated witness accounts of the fight between the two shorter men and Camberos and the chase that ensued. Escarcega indicated that there were three shots and that one hit Camberos in the back and killed him. Witnesses heard two to three shots, three bullet casings were found, and a single bullet to the back killed Camberos. Escarcega identified the murder weapon as a "nine," and ballistics verified that a nine millimeter gun had been used in the murder. Escarcega told the informant that defendants went out with a group of people to a hotel to celebrate afterwards. Garcia placed defendants at the hotel party with the people identified by Escarcega to the informant. Escarcega said the gun belonged to Ortiz. Garcia testified that Ortiz had a chrome pistol in his waistband at the party and was acting paranoid. In sum, the prosecution presented a compelling case, corroborated in detail by various facts. In light

of the informant's lack of personal knowledge of any of the material facts in the case, the purported error was harmless beyond a reasonable doubt.

Prior Bad Acts

After it was determined that Escarcega's statements to the informant would be admitted at trial, Gutierrez moved for redaction of the informant's statements regarding Gutierrez's alleged bad acts. As relevant here, Gutierrez objected to the informant's statements that: (1) he was carrying a gun on a day other than the day of the murder; (2) he was hunting for rival gang members on a day other than the day of the murder; and (3) he and his 16-year-old girlfriend were in a high speed car chase in which the driver of the vehicle was charged with child endangerment due to Gutierrez's girlfriend's young age.

With respect to the informant's statement that Gutierrez was carrying a gun on a day other than the murder, he objected to the following passage:

"[Escarcega:] What's up with Rival? That fool was out there doing shit?

"[Informant:] That fool fucking had me all over the place, dog, one night. I was just . . . .

"[Escarcega:] He was strapped up or what?

"[Informant:] Yeah. Well, of course, homey."

In the unredacted transcript, the informant also stated that he and Gutierrez were "just rolling around Lohart." Gutierrez's counsel argued it was too prejudicial for the jury to hear that he was walking around with a gun on a street that was identified in testimony as being close to Reggie Rodriguez Park. The prosecutor countered that she was not offering the statement for its truth, but because, "[t]his is the kind of talk that the informant uses with defendant Escarcega to get credibility with defendant Escarcega so that they'll continue to talk about more gang activity." She conceded that the informant was referring to a day other than the murder, but emphasized that she did not intend to argue the statement was true. She suggested that the court could rectify any perceived

problems with a limiting instruction. The court proposed redacting the statement that the informant and Gutierrez were "just rolling around Lohart." Defense counsel responded that his concern was that the jury would view Gutierrez as engaging in "gun play," and hunting down rival gang members on a day other than the day of the murder, particularly in light of the fact that there was a reference to a rival gang shortly afterward. He did not request a limiting instruction.

The trial court ruled that the statement that the informant and Gutierrez were "just rolling around Lohart" would be redacted, but that the rest of the statement would remain in. The court stated: "The reason for allowing the rest of it in is although there's some risk of prejudice because it refers to having a gun on a different occasion, it gives context to the jury to the later statement [that Gutierrez was the shooter] so that it could be argued that if the informant is telling Mr. Escarcega that Rival had a gun before, when Mr. Escarcega makes the statement putting the gun in Rival's hands on this day, he's kind of feeling like, well, now I can do that because he's already told me that the guy had a gun before so I'll just say that he did the shooting." The court ruled the statement was not inadmissible under Evidence Code section 352 because it provided context.

Gutierrez's counsel also objected to the informant's following statements about "Waffles"—a derogatory reference to members of the rival White Fence gang—which closely followed the statement that Gutierrez was carrying a gun: "the informant, he says . . . I guess Chunky and those fools were having trouble with the Waffles. [¶] And Mr. Escarcega says, why. [¶] And the informant answers, Rival, I don't know. They went -- they were f-ing going after those fools, aye?"

The trial court ordered the statements redacted pursuant to Evidence Code section 352. It explained: "Now I realize that just in the previous ruling, I referenced the fact that if Mr. Gutierrez had a gun before, that Mr. Escarcega might feel like he could put it in his hands on this occasion. But -- and so for similar reasons, this might be admissible; but this is, under [Evidence Code section] 352, really pushing the envelope because the jury is likely to take it as true. And the fact that it's [*sic*] so closely parallels this case, and it doesn't have any—it's not disserving to Mr. Escarcega at all, the prejudicial effect

outweighs the probative value."

Gutierrez's counsel also objected to the informant's statements regarding a car chase that the informant said involved Gutierrez:

"[Informant:] Oh, you know what happened? Rival's chick was in the car and she's like 16. So they busted Crazy for child endangerment on a high speed chase eh with Rival in the car, fucking crazy . . .

"[Escarcega:] She's only 16?

"[Informant:] Yeah. [Unintelligible.]

"[Escarcega:] Damn[.] [Unintelligible.]

"[Informant:] So they got her for child endangerment, homey. . . ."

Defense counsel argued that this was inadmissible as a prior bad act. Gutierrez was engaging in dangerous conduct by evading an officer in a vehicle. The prosecutor countered that Gutierrez had not been driving the vehicle, and that his girlfriend's age would not be prejudicial because Gutierrez was approximately the same age.[11]

The trial court ruled: "This is in the Chick Hearn section of the Evidence Code: no harm no foul. It's not prejudicial to anybody. It doesn't really help anybody that much, but there's no prejudice. So to the extent that there's minimal probative value, it stays in."

Law

Section 1101, subdivision (a) precludes admission of "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her prior conduct) . . . when offered to prove his or her conduct on a specified occasion." Thus, other acts may not be introduced simply for the purpose of establishing that party's bad character or predisposition to commit an act on the occasion at issue in the proceeding. (*People v.*

[11] Gutierrez was 17 years old at the time of the murder.

Kipp (1998) 18 Cal.4th 349, 369.) Section 1101, subdivision (b), however, provides that subdivision (a) does not "prohibit[] the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." While most of the authorities considering the admission of other-act evidence under section 1101 speak in terms of "other crimes" (see, e.g., *People v. Nible* (1988) 200 Cal.App.3d 838, 847-850,), the plain wording of the statute discloses that it is not so limited; "it embraces also 'other acts.'" (*People v. Harris* (1978) 85 Cal.App.3d 954, 958 .)

The Supreme Court has articulated a three-part test in evaluating the admissibility of other-act evidence: "(1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence." (*People v. Thompson* (1980) 27 Cal.3d 303, 315 (*Thompson*), superseded on other grounds as stated in *Clark v. Brown* (9th Cir. 2006) 442 F.3d 708, 714, fn. 2.)

Even if evidence is relevant for purposes of Evidence Code section 1101, subdivision (b), it may not be admitted if doing so would contravene the policies limiting admission, such as those contained in Evidence Code section 352. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; *People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) Such evidence may also be excluded if it is cumulative of other evidence offered to prove the same fact. (*People v. Balcom* (1994) 7 Cal.4th 414, 423; *Thompson*, *supra*, 27 Cal.3d at p. 318.)

"[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564; *People v. Falsetta* (1999) 21 Cal.4th 903, 913 ['The admission of relevant evidence will not offend

due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair.']; see also *Duncan v. Henry* [(199)] 513 U.S. [364,] 366.) Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. (*People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* [(1956)] 46 Cal.2d [818,] 836.)" (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

Discussion

Gutierrez contends that the trial court erred in admitting the informant's statement that he was carrying a gun on a day other than the day of the murder, that he was "'strapped' all the time," and that he and his 16-year-old girlfriend had been in a vehicle in a high speed car chase in which the driver was charged with child endangerment. Gutierrez claims the errors are so serious as to violate his due process rights. We conclude that the trial court did not abuse its discretion. For the reasons explained by the trial court, the admitted statements had important probative value that was not substantially outweighed by their tendency to prejudice the jury. Even if we were to conclude that the trial court erred, it is not reasonably probable the verdict would have been more favorable to Gutierrez absent the error, and the admitted evidence was not so prejudicial as to render Gutierrez's trial fundamentally unfair in violation of his right to due process.

The statement that Gutierrez was "of course" carrying a gun had potential to prejudice the jury, but that potential was limited by the trial court's excision of the reference to Lohart and exclusion to all mention of Gutierrez hunting for rival White Fence gang members on a day other than the day of the murder. Without these statements, the statement that he was "of course" carrying a gun was not tied to the park or to a hunt for rival gang members. Absent these concerns, the only other basis for Gutierrez's objection at trial was that it was evidence that he was carrying a gun on a day

other than the day of the murder. The limitations imposed by the trial court substantially decreased any potential for prejudice, and taking into account the wide discretion afforded the trial court, we cannot say as a matter of law that the probative value of evidence that Gutierrez had a gun other than on the day of the murder was substantially outweighed by its potential for prejudice.

Gutierrez also argues that the informant's statement that he "of course" carried a gun implied that he was "'strapped' all the time." He did not make this particular argument at trial, and has therefore forfeited the issue on appeal.[12] (*People v. Lewis* (2008) 43 Cal.4th 415, 503 [claim is forfeited where defendant fails to make a proper and timely objection on the same ground he raises on appeal].)

The informant's statements regarding the high speed car chase does not favorably portray Gutierrez. But the fact is that he was not driving, and being a passenger in a vehicle involved a chase is not particularly prejudicial in a case involved a gang-related murder, as the trial court reasonably concluded.

In contrast to this potential for prejudice, the trial court could reasonably find that the statements relating to Gutierrez's possession of a gun and the car chase had significant probative value. Both statements showed that the informant was well-acquainted with Gutierrez, which the jury could reasonably conclude would encourage Escarcega to open up to him. One of the more important issues the jury had to resolve in order to reach a verdict was whether Escarcega's statements were credible. His level of comfort with the informant was crucial to that determination. Evidence of the informant's personal knowledge of Gutierrez strongly supported the prosecution's assertion that Escarcega's statements were true. The statements tend to show that Escarcega would have good reason to trust the informant and be honest with him. The trial court did not abuse its discretion in determining that their probative value was not substantially outweighed by their potential for prejudice.

Moreover, the statements potential for prejudice was minimal in contrast to the

[12] The prosecutor stated that she didn't know "if defendant Gutierrez continuously walked around with a gun," but Gutierrez did not argue the point at the hearing.

overwhelming evidence presented to establish Gutierrez's guilt. As we have discussed, the trustworthy nature of Escarcega's conversation with the informant was apparent from the circumstances. It is highly unlikely that the jury would have rejected Escarcega's statements to the informant as untrue, because in addition to bearing strong indicia of reliability, the details of Escarcega's statements dove-tailed exactly with the other evidence presented at trial. Jimenez described Escarcega and another short man approaching Camberos, "hitting him up," beating him when he said he belonged to a rival gang, and chasing him down the street. He also described another taller man "guarding" them while they fought Camberos so that no one else could "jump in." The taller man ran after Camberos and the two shorter men as they left the park. Gomez described the same scene, except that he was unable to identify any of the assailants. After the four men ran from the park, Jimenez and Gomez heard two to three gunshots. When they went to investigate they found Camberos lying in a driveway with a gunshot wound. Garcia testified that she attended an all-night party with all three defendants. Ortiz had a gun tucked into his waistband and was acting paranoid. When officers arrived on the scene they discovered three shell casings, which an expert later identified as nine millimeter caliber. Camberos died of a single gunshot wound, and the bullet retrieved from his body was also of nine millimeter caliber. All three defendants made implicating statements in jail calls. Gutierrez told his sister he would give her a list of 15 witness names. Approximately 20 people had been on the basketball court on the evening of the murder and had potentially witnessed the beating and subsequent chase. Ortiz was very concerned that his bail was going to "jump up," which would be consistent with a charge for murder. Gutierrez told his girlfriend that he "did the crime," and would "do the time," referencing "that Reggie Rodriguez shit." Prosecution experts testified at length about gang culture and VNE in particular, noting that gang members work in groups with each person playing a role, and that the youngest member is often the shooter in such instances because older gang members have already put in their time. In light of the evidence presented, Gutierrez has failed to establish that any error in admitting the informant's statements regarding his alleged bad acts rendered the trial fundamentally

unfair, or that it is reasonably probable that the outcome would have been favorable to him had the statements not been admitted.

Sufficiency of the Evidence in Support of First Degree Murder

Ortiz contends the evidence is insufficient to support his conviction for first degree murder. He asserts that uncontradicted evidence was presented to establish Gutierrez shot Camberos. As an aider an abettor, he could only be found guilty of murder in the first degree if he knew Gutierrez intended to kill Camberos, and acted with the purpose of committing, encouraging, or facilitating the murder. He argues that the evidence was not sufficient for the jury to find that he knew that Gutierrez intended to kill Camberos. We reject Ortiz's attempt to reargue his case on the basis of select facts in the record. Substantial evidence supports the jury's verdict.[13]

Law

In determining whether sufficient evidence supports a conviction, "we review the

[13] Although Gutierrez joins in Ortiz's arguments to the extent that they benefit him, he does not supply any additional argument on the issue of aider and abettor liability as it applies to his unique circumstances. Joinder may be broadly permitted (Cal. Rules of Court, rule 8.200(a)(5)), but each defendant has the burden of demonstrating error and prejudice (*People v. Nilsson* (2015) 242 Cal.App.4th 1, 12, fn. 2; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["Because of the need to consider the particulars of the given case, rather than the type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice"]). To the extent Gutierrez's cursory joinder was an attempt to raise the issue of whether the evidence was sufficient to support his conviction as an aider and abettor, his reliance solely on Ortiz's arguments and reasoning is insufficient to satisfy his burden on appeal. Gutierrez waived the specific arguments raised for the first time in his reply brief. (See *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1292, fn. 6 ["Arguments presented for the first time in an appellant's reply brief are considered waived"].) Accordingly, we consider whether the evidence was sufficient to establish liability as an aider and abettor only as to Ortiz.

whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] . . . 'We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*).) The "testimony of a single witness is sufficient to support a conviction" unless it is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; see Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"].) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*Zamudio*, *supra*, at p. 357.)

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." (§ 31.) "An aider and abettor is one who acts 'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)" (*People v. Chiu* (2014) 59 Cal.4th 155, 161.)

When a charged offense is a specific intent crime, and the theory of accomplice liability is that he or she directly encouraged or facilitated the crime, the accomplice must share the actual perpetrator's specific intent in order to be found criminally liable to the same extent as the actual perpetrator. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165.) In the case of murder, the aider and abettor "'must know and share

the murderous intent of the actual perpetrator.' [Citation.]" (*Id*. at p. 1164)

A willful, deliberate, and premeditated killing "is murder of the first degree. All other kinds of murders are of the second degree." (§ 189.) "'[P]remeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767 (*Mayfield*), overruled on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.) In assessing the sufficiency of the evidence as to the element of premeditation and deliberation, "'[t]he true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes . . . those homicides . . . which are the result of mere unconsidered or rash impulse hastily executed.' [Citations.]" (*People v. Velasquez* (1980) 26 Cal.3d 425, 435, vacated and remanded on other grounds in *California v. Velasquez* (1980) 448 U.S. 903; *People v. Hughes* (2002) 27 Cal.4th 287, 370-371.)

Discussion

Ortiz concedes the prosecution "clearly established" he aided and abetted assault by preventing anyone from coming to Camberos's aid while Gutierrez and Escarcega were beating him, but contends the finding that he aided and abetted premeditated murder is mere speculation. We disagree.

The prosecution presented ample evidence of Ortiz's intent. A gang expert testified that the park was VNE territory, and that a rival's entry into a gang's territory is a showing of disrespect, which requires retaliation. Gang members earn respect by committing crimes, including by killing rival gang members, which is one of VNE's primary activities.

Evidence was presented that defendants were all members of VNE. They came to Reggie Rodriguez Park to search for rival gang members. Escarcega told the informant

that defendants had been "walking all over" for this purpose. Ortiz had personally given Gutierrez his own loaded gun for use that night. Defendants entered the park declaring their gang affiliation and claiming the area as their "barrio." They noticed Camberos's tattoos—which the gang expert testified are often used to indicate gang membership—and his "suspect" appearance. After passing the players on the basketball court, defendants went into the bathroom for a few minutes and then returned, from which it could be reasonably inferred that they mutually agreed to go back to confront Camberos. They interrupted the play on the basketball court to approach Camberos as soon as they returned. Just before attacking Camberos, defendants "hit him up" and verified that he was a member of the King Kobras, a rival of VNE. Ortiz directly participated by guarding the area and making sure no one was able to interfere while Gutierrez and Escarcega fought Camberos. He ran closely behind Gutierrez and Escarcega when they chased Camberos off the court, and was seen fleeing the area with them after Gutierrez shot Camberos with the gun Ortiz had given him. Ortiz then went out and "celebrated" the murder with other VNE members later that night.

Under the circumstances, it was reasonable for the jury to find that Ortiz knew Gutierrez planned to kill Camberos with the gun he had given him, and shared Gutierrez's intent to kill Camberos. The evidence tends to show that Ortiz intended and planned to kill a rival gang member, and specifically decided to kill Camberos when it was verified that he was a member of a rival gang. Ortiz had ample time to reflect on his decision, and did not appear to waver at any point. Substantial evidence supports Ortiz's first degree murder conviction.

Conspiracy Instruction

Ortiz contends that the trial court misinstructed the jury on conspiracy liability because it led the jurors to believe that he could be guilty of Camberos's murder if he conspired to kill a Southside Montebello gang member, although Camberos, a member of the rival King Kobra gang, was killed instead. He argues that to sustain a conviction for

first degree murder, the prosecution had to establish that Ortiz conspired to kill Camberos. Ortiz contends that his due process right to have a jury determine each element of the charged offense was violated because the instruction allowed the jury to convict him of first degree murder regardless of who he conspired to kill.[14] We disagree.

Proceedings

At trial, Gutierrez objected to instructing the jury regarding conspiracy to commit murder under CALCRIM No. 416. Ortiz and Escarcega joined in the objection. Defense counsel argued that "typically, conspiracy to commit murder is directed towards a particular targeted individual," and that evidence had not been presented to establish that there was any agreement to kill Camberos.

The prosecutor responded that proof of a conspiracy does not require a formal agreement, and may be established through conduct. Defendants brought a loaded gun to the park, and testimony had been presented that gang members work together in groups with every person filling a role.

The trial court identified the evidence supporting the instruction, including: Escarcega's statement to the informant that he believed the surveillance video captured them talking in the bathroom, which confirmed that defendants conversed in the bathroom; the fact that they came out of the bathroom and immediately engaged in conduct that resulted in Camberos's death; and the fact that defendants brought a loaded gun to the park with them in the first place. The court concluded that even if some evidence mitigated against finding that defendants conspired to commit murder there was substantial evidence to support giving the instruction.

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[14] Gutierrez joins in Ortiz's contention, but makes no separate particularized arguments in support of it in his opening brief. Ortiz's arguments are not equally applicable to Gutierrez, as there was ample evidence that Gutierrez shot at Camberos three times, and thus intended to kill him. Gutierrez has failed to meet his burden on appeal of demonstrating error and prejudice in his individual circumstances. (See footnote 14, *supra*.)

The trial court instructed the jury on conspiracy to commit murder under CALCRIM No. 416 as follows:

"The People have presented evidence of a conspiracy. A member of a conspiracy is criminally responsible for the acts or statements of any other member of the conspiracy done to help accomplish the goal of the conspiracy. [¶] To prove that a defendant was a member of a conspiracy in this case, the People must prove that:

"1. The defendant intended to agree and did agree with [one or more of] (the other defendant[s] to commit murder;

"2. At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would commit murder;

"3. One of the defendant[s][,] [or all of them] committed [at least one of] the following overt act[s] to accomplish murder:

"- brought a loaded gun to Reggie Rodriguez Park;

"- confronted the [*sic*] Raymond Camberos;

"- assaulted Raymond Camberos;

"- prevented others from defending Raymond Camberos;

"- chased Raymond Camberos;

"- shouted "shoot him";

"- fired 3 shots at Raymond Camberos

"AND

"4. [At least one of these] overt act[s] was committed in California.

"To decide whether a defendant committed these overt act[s], consider all of the evidence presented about the act[s].

"To decide whether a defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit murder, please refer to the separate instructions that I have given you on that crime.

"The People must prove that the members of the alleged conspiracy had an agreement and intent to commit murder. The People do not have to prove that any of the

members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit that crime. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.

"An overt act is an act by one or more of the members of the conspiracy that is done to help accomplish *the agreed upon crime*. The overt act must happen after the defendant has *agreed to commit the crime*. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.

"[You must all agree that at least one overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts.]

"[You must decide as to each defendant whether he or she was a member of the alleged conspiracy.]

"[You must also all agree on the degree of the crime.]

"[Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.]" (Italics added.)

Law

We review a claim of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210 (*Cole*).) "In conducting this review, we first ascertain the relevant law and then 'determine the meaning of the instructions in this regard.' [Citation.] [¶] The proper test for judging the adequacy of instructions is to decide whether the trial court 'fully and fairly instructed on the applicable law. . . .' [Citation.] '"In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]"' [Citation.] 'Instructions should be interpreted, if possible, so as to

support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.) "The test is whether there is a reasonable likelihood that the jury understood the instructions in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.)

Discussion

Preliminarily, Ortiz forfeited his claim by failing to object to the instruction at trial. Although he joined in Gutierrez's argument that there was not sufficient evidence to support giving the conspiracy instruction, he did not challenge the accuracy or responsiveness of CALCRIM No. 416 before the trial court. "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Lang* (1989) 49 Cal.3d 991, 1024, abrogated on another ground in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190; *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130.) The trial court is not required to give such a pinpoint or amplifying instruction on its own initiative, "and if the instruction as given is adequate, the trial court is under no obligation to amplify or explain in the absence of a request that it do so." (*Mayfield, supra*, 14 Cal.4th at p. 778.) A defendant's failure to request a clarifying or amplifying instruction at trial forfeits any argument on appeal that the instruction given was ambiguous or incomplete. (*Cole, supra*, 33 Cal.4th at p. 1211.)

Even if the claim was not forfeited, it fails on the merits. The instruction was both correct in law and responsive to the evidence. It is highly unlikely that the jury would interpret the instruction in a manner that would violate Ortiz's rights in light of the wording of the instruction, the evidence presented, and the prosecutor's argument.

CALCRIM No. 416 states in part, "An *overt act* is an act by one or more of the members of the conspiracy that is done to help accomplish *the agreed upon crime*. The overt act must happen after the defendant has *agreed to commit the crime*." (Italics

added.) The clear implication of this language is that the jury is not permitted to find a defendant guilty unless the crime that the defendant agreed to is the same crime advanced by the overt acts.

The agreed-upon crime in this case was either murder of a rival gang member generally or Camberos in particular. The evidence does not suggest that defendants agreed to limit their victims to Southside Montebellos or "Monkeys." Conspiracy to commit murder does not require that the conspirators agree to kill a particular individual. The specific crime the conspirators agree to commit may be as general as murder of a rival gang member. (See, e.g. *People v. Johnson* (2013) 57 Cal.4th 250, 267 ("defendants agreed to commit a specific crime . . . shooting a [member of a] rival [gang] in retaliation"].) Here, it was sufficient that defendants agreed to kill a rival, and that they killed Camberos shortly after ascertaining that he was a rival gang member.

In his statement to the informant, Escarcega indicated numerous times that he, Ortiz, and Gutierrez went out seeking to kill "rivals," although he expressed his personal preference would have been to kill a Southside Montebello gang member. The evidence surrounding the murder, which we have set forth earlier in this opinion in detail, strongly suggests that Ortiz and Gutierrez agreed this was the plan. All of the facts indicate that defendants agreed to kill a rival, and agreed to kill Camberos once it was determined that he was a rival.

In her closing argument and rebuttal, the prosecutor emphasized no less than eight times that her theory of liability relied on defendants hunting "rivals" and not exclusively Southside Montebello members. She also emphasized the language of CALCRIM No. 416, pointing out that it instructs: "An overt act is an act done by one or more of the members of the conspiracy that's done to help accomplish the *agreed-upon crime* . . . ." (Italics added.) The prosecutor explained that although Southside Montebello may have been VNE's most significant rival, defendants were not limiting their hunt to Southside Montebello members: "When you see these three men and what they've done and how they work together in the gang world, that is the intent that they informed [*sic*] before they went to that park was to kill a rival. And when you listen to the recording, when

Escarcega talks about what was going on that day and what they were looking for, it was a rival. [¶] Now, it wasn't [*sic*] expecting to find a King Kobra, but that doesn't matter. The law doesn't say oh, okay. Well you know what? It was a King Kobra, so oh, man. They must not have meant to kill him. No, they meant to kill him. King Kobra's a rival."

In light of the wording of the instruction, the strong factual support for the conclusion that defendants agreed to kill a rival and intended to kill Camberos in particular, and the prosecutor's arguments stressing that defendants intended to kill a rival and did not limit their sites to a rival in a specific gang, it is not reasonably likely that the jury misunderstood the import of CALCRIM No. 416.

Cruel and Unusual Punishment

Gutierrez, who was 17 years old at the time the murder was committed, contends that his sentence of 50 years-to-life is the functional equivalent of a sentence of life without parole, and violates his right to be free of cruel and unusual punishment under the Eighth Amendment. Gutierrez argues that the trial court erred in failing to consider youth-related mitigating factors as required by the United States Supreme Court's decision in *Miller, supra,* 567 U.S. ___ [132 S.Ct. 2455], which could entitle him to a meaningful opportunity for parole within his lifetime. Gutierrez requests that if his conviction is affirmed we either remand for resentencing with directions to the trial court to consider the factors set forth in *Miller* and sentence him to a straight life sentence or a sentence of 25 years-to-life, or order such a modification and instruct that the abstract of judgment reflect that Gutierrez shall be given a parole hearing in his 25th year of incarceration. As we discuss below, Gutierrez's claim that his sentence constitutes cruel and unusual punishment is moot in light of section 3051, which entitles him to a parole hearing in his 25th year of incarceration by operation of law. Remand is necessary, however, to give Gutierrez the opportunity to present evidence relevant at his eventual youth offender parole hearing, and to allow the prosecutor to respond.

Proceedings

Gutierrez filed a sentencing memorandum requesting the minimum sentence of consecutive terms of 25 years-to-life for the murder and firearm use. The memorandum conceded that Gutierrez was convicted of a homicide offense, but he would not be sentenced to life without parole. The memorandum agreed that the trial court had no obligation to consider all relevant information regarding his youth. The statutory punishment would result in a sentence that would make him eligible for parole within his lifetime under the holdings in *Miller*, *supra*, 567 U.S. ___ [132 S.Ct. 2455] and *People v. Caballero* (2012) 55 Cal.4th 262, 267-268 (*Caballero*) [imposition of a sentence to a term of years that amounts to de facto life without parole also constitutes cruel and unusual punishment in homicide cases involving juvenile offenders].) The prosecution agreed that *Miller* and *Caballero* were inapplicable, and sought a sentence of 80 years-to-life. Gutierrez replied that a sentence of 80 years-to-life was the functional equivalent of life without the possibility of parole, and moved for consideration of the *Miller* factors.

The trial court imposed the statutory minimum sentence of consecutive terms of 25 years-to-life, making Gutierrez eligible for parole after serving 50 years in prison, at approximately 70 years of age. The trial court agreed that the sentence was not the equivalent of life without parole. The court declined to consider the *Miller* factors in light of the fact that defense counsel had conceded that 50 years-to-life was not the equivalent of life without parole, and the court's decision to impose the minimum sentence required by law.

Law

In *People v. Franklin* (2016) 63 Cal.4th 261, our Supreme Court recently reviewed the pertinent series of United States Supreme Court cases dealing with the Eighth Amendment's prohibition of cruel and unusual punishment. (See *Miller, supra*, 567 U.S.

at p. ___ [132 S.Ct. at p. 2469] [juvenile offenders may not be subjected to mandatory life without parole]; *Graham v. Florida* (2010) 560 U.S. 48, 74 (*Graham*) [life without parole may not be imposed on juvenile offenders in non-homicide cases]; *Roper v. Simmons* (2005) 543 U.S. 551, 568 (*Roper*) [juvenile offenders may not be subjected to capital punisment.]) The *Franklin* court applied the reasoning of the high court's Eighth Amendment jurisprudence, and the impact of the 2014 enactment of sections 3051, 3046, and 4801, to a sentence identical to that imposed on Gutierrez. The holding in *Franklin* is dispositive of Gutierrez's Eighth Amendment contention.

Franklin held that imposition of a term of 50 years-to-life in a homicide case did not amount to a de facto sentence of life without parole, where the juvenile defendant was entitled to a parole consideration hearing during his 25th year of incarceration pursuant to section 3051. It explained: "After Franklin's sentencing, the Legislature passed Senate Bill No. 260, which became effective January 1, 2014, and added sections 3051, 3046, subdivision (c), and 4801, subdivision (c) to the Penal Code. . . . [T]hese new provisions entitle Franklin to a parole hearing during his 25th year in prison and thus renders [*sic*] moot any infirmity in Franklin's sentence under *Miller*. . . . [S]ection 3051 has superseded Franklin's sentence so that notwithstanding his original term of 50 years to life, he is eligible for a 'youth offender parole hearing' during the 25th year of his sentence. Crucially, the Legislature's recent enactment also requires the Board not just to consider but to 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.' (§ 4801, subd. (c).) For those juvenile offenders eligible for youth offender parole hearings, the provisions of Senate Bill No. 260 are designed to ensure they will have a meaningful opportunity for release no more than 25 years into their incarceration." (*Franklin*, *supra*, 63 Cal.4th at pp. 276-277.)

The defendant in *Franklin* was not entitled to resentencing because "section 3051 has changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible

for release on parole. The Legislature has effected this change by operation of law, with no additional resentencing procedure required." (*Franklin*, *supra*, 63 Cal.4th at pp. 278-279.)

Although the court affirmed his sentence, because Franklin had been sentenced prior to *Miller* and *Caballero*, it remanded the matter to the trial court "for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.App.4th at p. 284.) It instructed: "If the trial court determines that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' (*Graham*, *supra*, 560 U.S. at p. 79)." (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

Discussion

Like the defendant in *Franklin*, Gutierrez is eligible by operation of law for parole consideration in his 25th year of incarceration, as he is not excluded for any reason enumerated in section 3051, subdivision (h). In light of the holding in *Franklin*, Gutierrez's contention that his sentence constitutes cruel and unusual punishment is moot

because he will have a meaningful opportunity for release within his lifetime under section 3051.

Gutierrez must be afforded an opportunity to present evidence of youth-related factors for consideration at his future youth offender parole hearing in his 25th year of incarceration. Franklin had been sentenced prior to *Miller* and *Caballero*, so it was unclear whether he had an opportunity to make a record of the youth-related factors to be presented at his youth offender parole hearing. (*Franklin*, *supra*, 63 Cal.4th at p. 269.) In Gutierrez's case, the trial court declined to consider such factors because it was sentencing Gutierrez to the shortest sentence with the earliest opportunity for a parole hearing that it was authorized to impose by law. Absent our Supreme Court's holding in *Franklin*, it is reasonable to assume that the court believed consideration of the *Miller* factors to be superfluous, as they would have no apparent effect on Gutierrez's sentence. Following the approach in *Franklin*, Gutierrez is entitled to the opportunity to present evidence that may be relevant at his future youth offender parole hearing.

Gang Enhancements

Defendants contend that the trial court erred in imposing and staying 10-year gang enhancements as to each of them. The Attorney General concedes the issue. We agree, and order the trial court to modify the abstract of judgment to reflect that the gang enhancements are stricken as to all three defendants.

Calculation of Custody Credits

The trial court awarded Ortiz credit for 764 days in presentence custody credits, based on defense counsel's representation that Ortiz was taken into custody on June 10, 2013. The abstract of judgment and the July 13, 2015 minute order also reflect the credit for Ortiz as 764 actual days in custody. But, as the Attorney General points out, Ortiz was arrested on June 11, 2013, and remained in custody until sentencing on July 13,

2015, a total of 763 days.

Generally, it is the duty of the trial court to determine the periods of a defendant's custody and the number of days to be credited. (§ 2900.5, subd. (d).) When the facts are undisputed, however, a defendant's entitlement to custody credits presents a question of law for the appellate court's independent review, as the trial court has no discretion in awarding custody credits. (*People v. Shabazz* (1985) 175 Cal.App.3d 468, 473-474.) We may correct clerical errors at any time so that the record reflects the actual facts. (*In re Candelario* (1970) 3 Cal.3d 702, 705; *In re Roberts* (1962) 200 Cal.App.2d 95, 97.) Because the error is clerical in nature, the abstract of judgment must be corrected to accurately reflect Ortiz is awarded 773 presentence custody credits.

DISPOSITION

We remand the matter to the trial court for the following limited purposes: to allow Gutierrez an adequate opportunity to make a record of information that will be relevant to his future youth offender parole hearing; to amend the judgment to reflect that the 10-year enhancement imposed as to each of the defendants pursuant to section 186.22, subdivision (b)(5), is stricken; and to correct the judgment to show that Ortiz is awarded 763 days of presentence custody credit. Corrected abstracts of judgment shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

KRIEGLER, J.

We concur:

TURNER, P.J.

RAPHAEL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.